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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JUAN BAUTISTA-PEREZ, *et al.*,

Plaintiffs,

v.

ERIC HOLDER, *et al.*,

Defendants.

NO. C 07-4192 TEH

ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
CLASS CERTIFICATION AND  
BIFURCATION

This matter came before the Court on June 29, 2009, on Plaintiffs' Motion for Class Certification and Bifurcation in this class action case, which challenges the policy of the Departments of Justice and Homeland Security of charging more than the \$50.00 fee allegedly permitted by statute for registration for "Temporary Protected Status." Plaintiffs are before the Court seeking certification of their class of "[a]ll nationals of El Salvador, Honduras, and Nicaragua who have applied to register or re-register for Temporary Protected Status ("TPS") at any time from August 16, 2001 to the present." They also ask the Court to bifurcate issues of liability and injunctive and declaratory relief from the issue of the amount of restitution due to the class for TPS registration fees they paid in excess of the \$50 limit. Having carefully considered the parties' written and oral arguments, Plaintiffs' Motion is GRANTED for the reasons set forth below.

**FACTUAL AND STATUTORY BACKGROUND**

As this is one of a series of motions this Court has heard in this matter, this account of the facts draws heavily on that the Court presented in the prior motions, supplemented with additional facts provided by the parties pursuant to the present motion.

1 The Immigration Act of 1990 established a procedure whereby the government could  
2 provide temporary protection to aliens in the U.S. who were forced to flee their homelands  
3 because of natural disaster, civil strife and armed conflict, or other extraordinary and  
4 temporary conditions. The Secretary of Homeland Security may grant “Temporary Protected  
5 Status” (“TPS”) to nationals of certain countries temporarily designated under the statute 8  
6 U.S.C. § 1254a(a)(1), which allows those nationals to stay in the United States and obtain  
7 work authorization for the period their home country is so designated. 8 U.S.C. §  
8 1254a(a)(1)(B).

9 Once a country is designated for TPS, nationals of that country can register for  
10 benefits during a registration. To establish eligibility for TPS, an applicant must  
11 demonstrate, among other things, that he or she is a national of the country designated for  
12 TPS, has been continuously physically present and resided in the United States since the  
13 effective date of designation, and is otherwise admissible as an immigrant (although certain  
14 grounds of inadmissibility can be waived). 8 U.S.C. § 1254a(c)(2)(A); 8 C.F.R. §§ 244.2,  
15 244.3(a), 1244.3(a). The government can deny an applicant TPS on the basis of the  
16 applicant’s criminal history. 8 U.S.C. § 1254a(c)(2)(A)-(B); 8 C.F.R. §§ 244.3(c), 244.4,  
17 1244.3(c), 1244.4.

18 The statute at issue here limits the registration fee for TPS to \$50.00. Title 8 U.S.C.  
19 § 1254a(c)(1)(B) provides:

20 Registration fee

21 The Attorney General may require **payment of a reasonable fee as a**  
22 **condition of registering an alien** under subparagraph (A)(iv) (including  
23 providing an alien with an “employment authorized” endorsement or other  
24 appropriate work permit under this section). **The amount of any such fee shall**  
25 **not exceed \$50.** In the case of aliens registered pursuant to a designation under  
26 this section made after July 17, 1991, **the Attorney General may impose a**  
27 **separate, additional fee for providing an alien with documentation of work**  
28 **authorization.** Notwithstanding section 3302 of Title 31, all fees collected  
under this subparagraph shall be credited to the appropriation to be used in  
carrying out this section.

(emphasis added).

1 However, regulations governing TPS require applicants to pay more than just a \$50.00  
 2 registration fee and a work authorization fee. *See* 8 C.F.R. § 244.6. The Department of  
 3 Homeland Security (“DHS” or “Homeland Security”) requires individuals who wish to  
 4 obtain TPS to file:

- 5 1) an application form I-821 and extensive supporting documentation.  
 8 C.F.R. §§ 244.6, 244.9;
- 6 2) a registration fee for TPS of \$50.00. 8 C.F.R. § 103.7(b) (fee for  
 7 form I-821 not to exceed \$50.00); 72 Fed. Reg. 29529-02 (May 29,  
 8 2007); 72 Fed. Reg. 29534-01 (May 29, 2007); 72 Fed. Reg. 46649-  
 9 01 (August 21, 2007) (extensions of designation for Honduras,  
 Nicaragua, and El Salvador, respectively, setting fee at \$50.00);
- 10 3) an application for employment authorization, if desired, and a  
 \$340.00 fee for documentation of work authorization. 8 C.F.R.  
 §§ 103.7(b), 244.6; and
- 11 4) a “biometrics services fee” for applicants over 14. 8 C.F.R.  
 12 §§ 103.7(b)(1), 244.6. (The biometrics fee, previously set at  
 13 \$25.00, then \$70.00, was raised to \$80.00 on July 30, 2007. 72 Fed.  
 14 Reg. 29851-01, 29873 (May 30, 2007)).

15 Homeland Security charges the “biometrics services fee” for processing of fingerprints,  
 16 photographs, and electronic signatures used for background and security checks and identity  
 17 verification, and for storage and maintenance of the information so collected. Declaration of  
 18 Barbara Velarde, Chief of Service Center Operations for the United States Citizenship and  
 19 Immigration Services, Department of Homeland Security (“Velarde Decl.”) ¶¶ 7, 18 (filed on  
 20 September 25, 2007, in support of Opposition to Plaintiffs’ Motion for Preliminary  
 21 Injunction); *see also* 72 Fed. Reg. 29851, 29857 (May 30, 2007) (discussing uses of  
 22 biometrics fee). From the beginning of the class period until February 19, 2002, the  
 23 biometrics services fee was set at \$25.00. 63 Fed. Reg. 12979, 12981 (Mar. 17, 1998); 66  
 24 Fed. Reg. 65811, 65814 (Dec. 21, 2001).

25 Although aliens are required to re-register for TPS whenever a country is re-  
 26 designated, Homeland Security collects the \$50.00 TPS registration fee only once. 8 C.F.R.  
 27 § 244.17(a); 72 Fed. Reg. 46649, 46650 (August 21, 2007) (explaining fee structure for El  
 28 Salvador re-registration). However, aliens are required to pay a new biometrics fee, or file a

1 fee waiver, (and work authorization document fee) for each re-registration. 72 Fed. Reg.  
2 46649, 46653 (August 21, 2007); Velarde Decl. ¶ 13. Plaintiffs allege, and DHS admits,  
3 that it requires applicants to pay the biometrics fee even if Homeland Security does not need  
4 updated biometric information. Velarde Decl. ¶ 19. The parties dispute precisely how and  
5 when the biometrics fees are collected, and in which situations the information is resubmitted  
6 upon re-registration. Plaintiffs contend that biometrics information is only collected once,  
7 while the Government presents evidence that the information is at times collected repeatedly.  
8 Both parties agree that some TPS re-registrants receive “reuse” notices that inform them that  
9 their re-registrations can be processed without submission of additional biometric data.  
10 Despite this dispute, what is clear is that under the regulations, and the publications of  
11 USCIS, the biometrics fee or a fee waiver is required for all applicants over the age of 14,  
12 even if the biometrics information is not collected a second time.

13 El Salvador was designated for Temporary Protected Status after the January 2001  
14 earthquake. Since then, the Attorney General and, later, the Secretary of Homeland Security  
15 have extended the designation multiple times; the most recent extension will expire on  
16 September 9, 2010. 73 Fed. Reg. 76039, 76040 (December 15, 2008). Honduras and  
17 Nicaragua were designated for TPS in 1999. The most recent extension of their designations  
18 will expire on July 5, 2010. 73 Fed. Reg. 57133 (Oct. 1, 2008) and 73 Fed. Reg. 71021  
19 (Nov. 24, 2008).

20 This class action for declaratory and injunctive relief challenges the Justice  
21 Department and Department of Homeland Security’s (“the Government”) policy of charging  
22 fees totaling more than the \$50.00 fee allegedly permitted by statute as a condition of  
23 registering for “Temporary Protected Status.” Plaintiffs, foreign nationals from Honduras, El  
24 Salvador, and Nicaragua who currently have TPS status, claim that they have been required  
25 to remit fees totaling over \$50.00 on multiple occasions as they re-register for TPS. First  
26 Amended Complaint ¶ 12. They claim that because 8 U.S.C. § 1254a(c)(1)(B) provides that  
27 the fee charged by DHS “as a condition of registering” for TPS is “not to exceed” \$50.00, the  
28 additional biometric services fee is unlawful. Their class action Complaint, brought on

1 behalf of all nationals of El Salvador, Honduras, and Nicaragua who submitted applications  
 2 to register or re-register for TPS and were required to pay fees of more than \$50.00, *id.* ¶¶  
 3 26-28, seeks an order

- 4 • declaring that additional fee for collecting biometric information or any combined  
 5 fee over \$50.00 is unlawful under 8 U.S.C. § 1254a(c)(1)(b);
- 6 • invalidating those parts of 8 C.F.R. § 244.6 that requires Plaintiffs and other class  
 7 members to pay biometric service fees;
- 8 • enjoining DHS from imposing fees over \$50.00;
- 9 • enjoining DHS from imposing a fee when collection of biometric information is  
 10 unnecessary; and
- requiring the Defendants to refund all fees over \$50.00 paid by class members.

11 *Id.* Prayer for Relief ¶¶ 2-7.

12 In this motion, Plaintiffs seek to certify a class defined as “[a]ll nationals of El  
 13 Salvador, Honduras, and Nicaragua who have applied to register or re-register for Temporary  
 14 Protected Status (“TPS”) at any time from August 16, 2001 to the present.” Pls.’ Mot. at 2.  
 15 Proposed named Plaintiffs are individuals who are nationals of El Salvador, Honduras, or  
 16 Nicaragua, who after August 16, 2001 applied to register or re-register for TPS.

17 Plaintiffs filed suit in this case on August 16, 2007. In the intervening time, the Court  
 18 has considered and denied Plaintiffs’ motions for preliminary injunction and temporary  
 19 restraining order, and Defendants’ motions to dismiss. The instant motion was filed on  
 20 December 8, 2008, and stayed during the pendency of Defendants’ second motion to dismiss.  
 21 Having denied that motion, the motion for class certification is now properly before the  
 22 Court.

## 24 **LEGAL STANDARD**

25 A party seeking to certify a class must demonstrate that it has met all four  
 26 requirements of Federal Rule of Civil Procedure 23(a) and at least one of the requirements of  
 27 Rule 23(b). *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Rule  
 28 23(a) allows a class to be certified

1 only if (1) the class is so numerous that joinder of all members is impracticable;  
2 (2) there are questions of law or fact common to the class; (3) the claims or  
3 defenses of the representative parties are typical of the claims or defenses of  
the class; and (4) the representative parties will fairly and adequately protect  
the interests of the class.

4 Fed. R. Civ. P. 23(a); *see also Zinser*, 253 F.3d at 1186. That is, the class must satisfy the  
5 requirements of numerosity, commonality, typicality, and adequacy. Rule 23(b) provides for  
6 the maintenance of several different types of class actions. Fed. R. Civ. P. 23(b). Plaintiffs  
7 seek to certify the class under Rule 23(b)(2), which allows a class to be certified if the court  
8 finds that “the party opposing the class has acted or refused to act on grounds that apply  
9 generally to the class, so that final injunctive relief or corresponding declaratory relief is  
10 appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

11 The party seeking certification must provide facts to satisfy these requirements;  
12 simply repeating the language of the rules in its moving papers is insufficient. *Doninger v.*  
13 *Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977). A district court must conduct a  
14 “rigorous analysis” of the moving party’s claims to examine whether the requirements of  
15 Rule 23 are met. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). However,  
16 although the court is “at liberty” to consider evidence that relates to the merits if such  
17 evidence also goes to the requirements of Rule 23, *Hanon v. Dataproducts Corp.*, 976 F.2d  
18 497, 509 (9th Cir. 1992), the court may not consider whether the party seeking class  
19 certification has stated a cause of action or is likely to prevail on the merits. *Eisen v. Carlisle*  
20 *& Jacquelin*, 417 U.S. 156, 178 (1974). If a district court concludes that the moving party  
21 has met its burden of proof, then the court has broad discretion to certify the class. *Zinser*,  
22 253 F.3d at 1186.

## 23 24 **DISCUSSION**

### 25 **I. Analysis of Plaintiffs’ Claims: Defendants’ Non-Rule 23 Arguments**

26 Prior to analyzing the motion under Rule 23, the Court must consider a series of  
27 additional arguments that the Government offers in contesting the class certification motion.  
28

1 The Government contends that Plaintiffs seek to certify a class that lacks standing and  
2 ripeness. In so claiming, the Defendants argue that “a named plaintiff must have personally  
3 sustained or be in immediate danger of sustaining ‘some direct injury as a result of the  
4 challenged statute or official conduct.’ *Armstrong v. Davis*, 275 F.3d 849, 860 (9th Cir.  
5 2001), quoting *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974). The harm suffered by a  
6 plaintiff must constitute ‘actual injury.’ *Armstrong* at 860.” Defs.’ Opp. at 7. Although  
7 Plaintiffs’ class definition does not specify the concrete injury, it is clear from Plaintiffs’  
8 motion for certification what injury they assert: they were subjected to a regulation that they  
9 allege contravenes existing federal law and were required to either pay a fee or submit a fee  
10 waiver. The Government offers no authority for the proposition that the proposed class  
11 definition must articulate the precise injury alleged. As such, the Court finds that the  
12 proposed class definition satisfies the cases on which Defendants rely. The named Plaintiffs  
13 have alleged that they have personally sustained direct injury as a result of the regulation  
14 they challenge. This is adequate for standing to exist.

15 As to the ripeness claim, ripeness is a doctrine that permits a party to challenge the  
16 justiciability of a claim for being brought prematurely, generally because the injury is  
17 speculative and may never occur. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)  
18 (The “basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of  
19 premature adjudication, from entangling themselves in abstract disagreements over  
20 administrative policies, and also to protect the agencies from judicial interference until an  
21 administrative decision has been formalized and its effects felt in a concrete way by the  
22 challenging parties.”), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99  
23 (1977). Defendants argue that the claim is not ripe because there is no concrete case or  
24 controversy, since the Plaintiffs have already applied and paid fees for the last registration  
25 period, and no other period is pending; the Government thus claims that the Plaintiffs cannot  
26 establish a claim for relief since repetition is speculative. This argument is not persuasive,  
27 however, as Plaintiffs allege past injury through the application of the allegedly invalid  
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1 regulation, which exacted an improper fee from Plaintiffs. This surely qualifies as a concrete  
2 injury.

3 To the extent that the Government challenges Plaintiffs' claim for prospective  
4 injunctive relief, the Court has previously addressed this issue. Defendants' Opposition,  
5 having been filed on January 12, 2009, prior to the Court's Order Denying Defendant's  
6 Motion to Dismiss of May 1, 2009, raises legal arguments that this Court resolved in its May  
7 1 Order. To the extent that the Government's arguments against prospective injunctive relief  
8 are framed as mootness claims, given their reliance on the doctrine of "capable of repetition  
9 yet evading review," the Court carefully considered this issue in its Order of May 1, held that  
10 the claims are not moot, and that these claims are precisely the kind that are likely to repeat  
11 yet consistently evade review. *See id.* at 8-10.

12 Defendants also argue that this Court lacks jurisdiction because Plaintiffs failed to  
13 properly bring their case under the jurisdiction of the Little Tucker Act, having not pleaded  
14 this basis of jurisdiction and having pleaded the case against the Attorney General and  
15 Secretary of Homeland Security, instead of against the United States. Again, the Court's  
16 previous ruling that it has jurisdiction over this matter under the Little Tucker Act, and will  
17 not be mechanistic in requiring Plaintiffs to plead their case as against the United States to  
18 assert that this Court has such jurisdiction, resolves this issue. *See id.* at 5-8. That Plaintiffs  
19 have fully submitted to all aspects of the application of the Little Tucker Act lends further  
20 support to this conclusion of the Court.

21 Finally, Defendants' Opposition also asserts that the certification motion is contrary to  
22 the Little Tucker Act because some class members are not residents of this judicial district.  
23 Again, Defendants raised this argument in their second motion to dismiss, and the Court  
24 resolved this legal issue in its May 1, 2009 Order, holding that pursuant to Judge Alsup's  
25 ruling in *Briggs v. United States*, 2009 WL 113387, 5-7 (N.D. Cal. Jan. 16, 2009), a Little  
26 Tucker Act class action may be brought for a nationwide class where the named Plaintiffs are  
27 resident of the judicial district, and further, that the alien Plaintiffs are resident for purposes  
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1 of the challenged statute and regulations. Order Denying Defendant's Motion to Dismiss,  
2 May 1, 2009, at 12-14.

## 3 **II. Rule 23**

### 4 **A. Rule 23(a) Requirements**

#### 5 **1. Numerosity**

6 Numerosity does not require that joinder of all members be impossible, but only that  
7 joinder be impracticable. *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439, 448  
8 (N.D. Cal. 1994); Fed. R. Civ. P. 23(a)(1). Plaintiffs do not need to state the exact number of  
9 potential class members, and numerosity does not require a specific number of class  
10 members. *Arnold*, 158 F.R.D. at 448. The determination of whether joinder is impracticable  
11 depends on the facts and circumstances of each case. *Id.*

12 The Government does not contest numerosity in this case, and acknowledges that the  
13 putative class consists of potentially hundreds of thousands of persons. Def.'s Opp. at 9.  
14 This number is more than sufficient to satisfy the numerosity requirement of Rule 23(a)(1).

#### 15 **2. Commonality**

16 Rule 23(a)(2) requires that common questions of law or fact exist among class  
17 members. Fed. R. Civ. P. 23(a)(2). The Ninth Circuit construes the commonality  
18 requirement under this rule "permissively," having noted that the requirement under Rule  
19 23(a)(2) is less rigorous than that under Rule 23(b)(3). *Hanlon v. Chrysler Corp.*, 150 F.3d  
20 1011, 1019 (9th Cir. 1998); *compare* Fed. R. Civ. P. 23(b)(3) (requiring that common  
21 questions of law or fact "predominate" in class actions maintained under this subsection)  
22 *with* Fed. R. Civ. P. 23(a)(2) (not including "predominate" or similar language in describing  
23 the general commonality requirement). It is sufficient for class members to have shared legal  
24 issues but divergent facts or, similarly, to share a common core of facts but base their claims  
25 for relief on different legal theories. *Hanlon*, 150 F.3d at 1019. Indeed, the Ninth Circuit  
26 considers the requirements for finding commonality under Rule 23(a)(2) to be "minimal."  
27 *Id.* at 1020.

28

1 The Government offers several arguments for why commonality is absent such that  
2 certification should be denied. First, the Government contends that because the class is not  
3 defined by a requirement of having paid fees in excess of the statutory limit, the class is  
4 merely hypothetical, lacking both standing and commonality. Second, had the Plaintiffs  
5 moved to certify a class that was defined by payment, commonality would be lacking for  
6 persons who had not paid in excess of \$50. Those persons would include those under 14  
7 years of age, or those who had not reapplied after the \$50 biometric fee was imposed. Third,  
8 the Government argues that two of the proposed named plaintiffs, Oscar Rene Ramos and  
9 Maria Salazar, initially registered prior to the beginning of the class definition on August 16,  
10 2001. The Defendants further claim that these Plaintiffs' claims are time barred under the  
11 applicable statute of limitations of 28 U.S.C. § 2401. Fourth, Defendants contend that  
12 because all but one of the named Plaintiffs received a "reuse notice" in which their re-  
13 registrations were processed without requiring new fingerprinting, their claims differ from  
14 those who did not receive reuse notices. As there is no Salvadoran or Honduran named  
15 Plaintiff who did not receive a reuse notice, they argue that there is inadequate commonality.  
16 The Government argues that the "reuse" theory Plaintiffs will be prosecuting a different  
17 claim from those who did not receive the "reuse notice."

18 Given that the Ninth Circuit has highlighted the minimal nature of the requirements to  
19 establish commonality, none of these arguments is sufficient to defeat commonality.  
20 Defendants have offered no authority requiring that the class definition itself must  
21 demonstrate the commonality of their injury in the mere text of their class definition. Rather,  
22 the Ninth Circuit has held that the party seeking certification must provide facts to satisfy the  
23 requirements of Rule 23; it must logically follow that the class definition alone does not  
24 defeat certification, but that inquiry into the surrounding facts is permitted. *Doninger*. 564  
25 F.2d at 1309. Second, commonality does not require Plaintiffs to demonstrate identical  
26 injury to obtain certification. *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The  
27 amount of damages is invariably an individual question and does not defeat class action  
28 treatment."). Plaintiffs here expressly seek an array of injunctive and declaratory relief in

1 addition to relief from the financial injury that Defendants assert is lacking from the class  
2 definition, so it is not merely money that unifies the class, but also the common subjection to  
3 the same challenged regulatory scheme. Third, to the extent that the class definition specifies  
4 that the class is comprised of persons who registered or re-registered during the class period,  
5 the claims of Ramos and Salazar are not automatically excluded from class treatment. The  
6 Court is not to consider likelihood of success on the merits, but only the cohesiveness of the  
7 class, on a motion for certification. Thus, whether Ramos, Salazar, and similarly situated  
8 class members who seek remedy based on re-registration, as opposed to initial registration,  
9 can prevail on the merits or are time-barred from asserting a claim is a question for a later  
10 stage of litigation. *Eisen*, 417 U.S. at 178. Their claims do not lack commonality simply  
11 because a legal question regarding the statute of limitations remains for resolution at the  
12 merits stage of litigation.

13 Fourth, class certification does not require each class member to prosecute an identical  
14 legal theory. Instead, it is sufficient to demonstrate a common set of operative facts.  
15 Plaintiffs have successfully met this burden. They have identified the relevant federal statute  
16 and the regulations that they believe to violate the statute, and offer as a common legal  
17 question the propriety of a regulation requiring payment of fees beyond an initial \$50  
18 registration fee. To inquire further into the merits of this claim is improper at the stage of  
19 class certification. While any monetary portion of relief will be determined after a decision  
20 on the merits, in light of any fees that are proven to have been illegally charged, the Ninth  
21 Circuit has made clear that differing amounts of damages do not defeat class certification.  
22 *Blackie*, 524 F.2d at 905 (“The amount of damages is invariably an individual question and  
23 does not defeat class action treatment.”). That various class members differ in the final  
24 amount of monetary restitution they might seek does not defeat commonality. Plaintiffs  
25 clearly meet the minimal commonality requirement of Rule 23(a)(2), as the common question  
26 of law of whether the TPS applicants are subject to fees that contravene the regulations  
27 unifies the class.

28 //

1 **3. Typicality**

2 Rule 23(a)(3) requires typicality, which the Ninth Circuit also interprets permissively.  
3 *Hanlon*, 150 F.3d at 1020. Typicality requires that the named plaintiffs be members of the  
4 class they represent and “possess the same interest and suffer the same injury” as class  
5 members. *Falcon*, 457 U.S. at 156 (citation omitted). The named plaintiffs’ claims need not  
6 be identical to the claims of the class to satisfy typicality; rather, the claims are typical if they  
7 are “reasonably co-extensive with those of absent class members.” *Hanlon*, 150 F.3d at  
8 1020. It is sufficient for named plaintiffs’ claims to “arise from the same remedial and legal  
9 theories” as the class claims. *Arnold*, 158 F.R.D. at 449.

10 The Government likewise disputes typicality, but offers little in the way of authority  
11 to justify its argument beyond the arguments presented against commonality, and none of  
12 those claims militates against a finding of typicality. The Government’s best argument is  
13 that the Salvadoran and Honduran named Plaintiffs differ from the rest of the class because  
14 they all received reuse notices; to the extent that the group of named Plaintiffs lacks a  
15 Salvadoran or Honduran who did not receive a reuse notice, the Government asserts that the  
16 representatives are not typical. However, the Government offers no reason to distinguish  
17 between the nationalities of the named Plaintiffs and the members of the class in determining  
18 the typicality of their claims. Nationals of all three countries represented in this suit were  
19 subject to operatively identical statutes, regulations, and policies, and paid fees accordingly.  
20 Defendants have provided no authority for such a distinction. Rather, Plaintiffs have  
21 demonstrated that the named Plaintiffs’ claims are reasonably co-extensive with those of the  
22 absent class members. All claims arise from the same remedial theory of the inconsistency  
23 between the fee structure permitted in the applicable statute and that required by the related  
24 regulation. As a result, the legal theories at the core of this case arise from a legal challenge  
25 to the same set of regulations controlling the TPS registrations and re-registrations of all  
26 putative class members during the class period. The Court therefore finds that Plaintiffs have  
27 met their burden under Rule 23(a)(3).

28 //

1 **4. Adequacy**

2 The fourth and final Rule 23(a) requirement – adequacy – requires (1) that the  
3 proposed representatives do not have conflicts of interest with the proposed class and  
4 (2) that the representatives are represented by qualified counsel. *Hanlon*, 150 F.3d at 1020;  
5 *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998).

6 In this case, the Government disputes the adequacy of the proposed class  
7 representatives, arguing that the proposed named plaintiffs have a conflict of interest with the  
8 class because some have a possible statute of limitations bar, and because some may pursue a  
9 more complex legal theory based on a “reuse” notice. The Government offers no rationale  
10 for why these differences constitute a conflict of interest. That different class members  
11 present different legal theories to justify the remedy they seek does not automatically mount  
12 a conflict, and is in fact an acknowledged aspect of class action litigation in some cases.  
13 *Hanlon*, 150 F.3d at 1019. Plaintiffs have shown that each named Plaintiff participated in the  
14 TPS program by registering and re-registering at various points during the class period. To  
15 the extent that trivial differences exist among the claims of the named Plaintiffs, such  
16 differences are demonstrative of the different legal theories that are available to the class, and  
17 are not evidence of a conflict of interest. The Court thus finds the named Plaintiffs to be  
18 adequate representatives of the class.

19 The Court also finds that Plaintiffs’ counsel are experienced class action litigators, a  
20 fact that Defendants do not dispute. *See* Dardarian Decl. in Support of Mot. for Class Cert.  
21 ¶¶ 4-8. Pursuant to Federal Rule of Civil Procedure 23(g)(1)(A), the Court finds that: (1)  
22 Plaintiffs’ counsel have diligently identified and investigated potential claims in this  
23 litigation; (2) counsel have sufficient experience in pursuing class cases; (3) counsel have  
24 demonstrated an adequate understanding of the applicable law; and (4) counsel have the  
25 necessary resources to fully represent the class throughout this litigation and are committed  
26 to dedicating those resources to this case. Based on Plaintiffs’ counsel’s representation in  
27 this case thus far and the material contained in the Dardarian Declaration, counsel appears to  
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1 be adequate. Accordingly, the Court finds that Plaintiffs have satisfied the adequacy  
2 requirements of Rule 23(a)(4).

3 **B. 23(b)(2) Requirements**

4 Having found that the proposed class satisfies the requirements of Rule 23(a), the  
5 Court must consider whether the class also meets the requirements of Rule 23(b). Plaintiffs  
6 seek to certify the class under Rule 23(b)(2), which allows a class to be certified if the court  
7 finds that “the party opposing the class has acted or refused to act on grounds that apply  
8 generally to the class, so that final injunctive relief or corresponding declaratory relief is  
9 appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2).

10 “Class actions certified under Rule 23(b)(2) are not limited to actions requesting only  
11 injunctive or declaratory relief, but may include cases that also seek monetary damages.”  
12 *Probe v. State Teachers’ Ret. Sys.*, 780 F.2d 776, 780 (9th Cir. 1986). The issue, under  
13 precedent cases in the Ninth Circuit, is whether the primary relief sought is declaratory or  
14 injunctive. *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1195 (9th Cir. 2001).  
15 The Ninth Circuit has adopted a fact-specific test to distinguish between incidental and  
16 nonincidental damages for the purposes of determining the predominant form of relief,  
17 focusing “on the language of Rule 23(b)(2) and the intent of the plaintiffs in bringing the  
18 suit,” and leaving the ultimate determination in the discretion of the district court. *Molski v.*  
19 *Gleich*, 318 F.3d 937, 950 (9th Cir. 2003).

20 In *Molski*, the Ninth Circuit cited with approval a Second Circuit case that held that  
21 before allowing (b)(2) certification a district court should, at a minimum,  
22 satisfy itself of the following: (1) even in the absence of a possible monetary  
23 recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or  
24 declaratory relief sought; and (2) the injunctive or declaratory relief sought  
would be both reasonably necessary and appropriate were the plaintiffs to  
succeed on the merits.

25 *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 164 (2nd Cir. 2001) (internal  
26 quotation marks omitted), quoted with approval in *Molski*, 318 F.3d at 950 n. 15. That  
27 Second Circuit case further stated that “incidental damages must be susceptible to  
28 computation by means of objective standards and not dependent in any significant way on

1 the [class members'] intangible, subjective differences, which compensatory damages clearly  
2 are." *Robinson*, 267 F.3d at 164 (internal quotation marks omitted).

3 Given that certification is broadly within the discretion of this Court, the Court finds  
4 that Plaintiffs' claim ultimately meets the standard for 23(b)(2) certification. *See Armstrong*,  
5 275 F.3d at 872 n.28 ("Federal Rule of Civil Procedure 23 provides district courts with broad  
6 discretion to determine whether a class should be certified, and to revisit that certification  
7 throughout the legal proceedings before the court."). While the Government asserts a  
8 laundry list of arguments, none defeats the fundamental requirements of Rule 23(b)(2).  
9 Defendants first argue that this case is based solely upon jurisdiction under the Little Tucker  
10 Act which permits only monetary, as opposed to injunctive and declaratory, relief. Since  
11 certification under Rule 23(b)(2) requires injunctive and declaratory relief, Defendants claim  
12 that certification is impossible under the jurisdiction of the Little Tucker Act. Such argument  
13 fundamentally misapprehends the prior rulings of this Court in this case. In this Court's  
14 Order Denying Defendants' Motion to Dismiss, or, in the Alternative, to Transfer Venue of  
15 February 4, 2008, this Court clearly held:

16 This Court also has the power to grant whatever equitable relief might be  
17 necessary, whether it is considered "associated with and subordinated to" the  
18 Tucker Act monetary claim, *Wilkins v. United States* 279 F.3d 782, 786 (9th  
Cir. 2002) (citation omitted), or separate equitable relief which the Court can  
grant under § 702 of the APA.

19 Simply stated, although this Court has dedicated significant attention to Plaintiffs' Little  
20 Tucker Act claims, this has been largely dictated by the fact that such claims were the basis  
21 of Defendants' motions to dismiss. The Court has never stated that the Little Tucker Act is  
22 the sole basis of jurisdiction in this case, that Little Tucker Act claims are the sole basis of  
23 this case, or even that such claims are predominant. Rather, the Court has been clear that it  
24 has jurisdiction over Plaintiffs' monetary claims, if construed as a legal remedy, under the  
25 Little Tucker Act, and further has jurisdiction over Plaintiffs' equitable claims either as a  
26 matter "associated with and subordinated to" the Little Tucker Act claims or separately under  
27 the APA. That Plaintiffs bring claims under both the Little Tucker Act and the APA does not  
28 defeat certification.

1 Second, the Government argues that certification pursuant to Rule 23(b)(2) is  
 2 inappropriate because Plaintiffs have not satisfied the Rule 23(b)(2) standard of showing that  
 3 “the party opposing the class has acted or refused to act on grounds that apply generally to  
 4 the class, so that final injunctive relief or corresponding declaratory relief is appropriate  
 5 respecting the class as a whole.” As explained above, in the analysis of Rule 23(a)(2)-(4),  
 6 Plaintiffs have shown that the Government’s promulgation and application of the challenged  
 7 regulations have applied generally to the class. If the Court were to grant the relief that  
 8 Plaintiffs seek,<sup>1</sup> such relief would apply generally to all class members. Although the actual  
 9 monetary sums extracted from individual class members varies according to the number of  
 10 times the individual registered or re-registered, such relief does not defeat certification;  
 11 monetary relief may accompany injunctive and declaratory relief. Even this monetary relief  
 12 would be generally applicable, as it would be determined based on the sum paid in excess of  
 13 the statutory limit, and not individual, personal factors.

14 Third, the Government argues that certification under Rule 23(b)(2) is inappropriate  
 15 because Plaintiffs seek primarily monetary damages. The Defendants argue that equitable  
 16 restitution is not available to Plaintiffs under the Little Tucker Act, and further, that the “kind  
 17 of restitution that the plaintiffs seek is not equitable.” Defendants thus assert that the  
 18 Plaintiffs’ claim is primarily for money damages, which prohibits them from seeking  
 19 certification under Rule 23(b)(2).

20 The Court need not resolve whether this monetary claim is at law or equity, because in  
 21 either situation, certification is appropriate. In its Order of February 4, 2008, the Court  
 22 declined to rule on whether Plaintiffs’ monetary claims were for damages or equitable relief,  
 23 holding that if equitable, then the Court had jurisdiction under the APA, and if monetary, the

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24  
 25 <sup>1</sup>• declaring that additional fee for collecting biometric information or any combined  
 fee over \$50.00 is unlawful under 8 U.S.C. § 1254a(c)(1)(b);  
 26 • invalidating those parts of 8 C.F.R. § 244.6 that requires Plaintiffs and other class  
 members to pay biometric service fees;  
 27 • enjoining DHS from imposing fees over \$50.00;  
 • enjoining DHS from imposing a fee when collection of biometric information is  
 unnecessary; and  
 28 • requiring the Defendants to refund all fees over \$50.00 paid by class members.

1 Court had jurisdiction under the Little Tucker Act, and in any event, jurisdiction was proper.  
2 Either conclusion would likewise permit this Court to certify the class. If the monetary  
3 claims are framed as relief for specific restitution, then certification is proper under Rule  
4 23(b)(2), which permits certification of classes that seek injunctive relief.

5         However, if the claims are framed as damages, then Plaintiffs must satisfy the legal  
6 standards recited at the beginning of this section in order to prevail on a motion for class  
7 certification under Rule 23(b)(2). Defendants argue that Plaintiffs have failed to meet their  
8 burden to establish that injunctive remedy is their primary concern. On the contrary, at every  
9 opportunity the Plaintiffs have consistently asserted that injunctive relief is what they seek.  
10 They present a prayer for relief that articulates five remedies, four of which are obviously  
11 injunctive, one of which is monetary and of a disputed nature. Given the repetitive nature of  
12 the TPS re-registration process, seeking declaratory and injunctive relief from future  
13 application of fees is a reasonable form of remedy, even in the absence of monetary recovery.  
14 Injunctive relief would be appropriate if Plaintiffs were to succeed on the merits, as it would  
15 prevent the Government from collecting excess fees in the next iteration of the TPS program.  
16 Finally, according to the standard recited in *Robinson*, which the Ninth Circuit cited  
17 favorably, the monetary relief sought here is purely objective, based solely on funds already  
18 paid to the Government, without regard for the personal differences between class members.  
19 267 F.3d at 164. All of these factors militate toward a finding that the monetary relief  
20 sought, if considered a legal remedy, is merely incidental to the injunctive and declaratory  
21 remedies sought. For this reason as well, certification under Rule 23(b)(2) is appropriate.

22         Fourth, the Government raises Due Process concerns regarding Plaintiffs' attempt to  
23 certify the class under Rule 23(b)(2), which does not permit opt-out procedures, instead  
24 resolving the legal rights of consenting and nonconsenting class members alike. *See Ortiz v.*  
25 *Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999). However valid the concerns raised by the  
26 Court in that case, they are not directly applicable here, as certification there was sought  
27 under Rule 23(b)(1)(B), not 23(b)(2) which is invoked in the instant matter. Defendants  
28 additionally cite *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam)

1 (dismissing certiorari), in which the Supreme Court mentions “a substantial possibility” that  
2 class actions seeking money damages can only be certified under Rule 23(b)(3). In the  
3 absence of a clear holding to that effect, this does not bind the Court in the instant matter.

4 Defendants urge the Court to adopt the legal safeguards of Rule 23(b)(3), asserting  
5 that as this case has primarily to do with recovery of money, 23(b)(2) certification is  
6 inappropriate. The Court will decline to do so at this time. As just discussed above, the  
7 Court has concluded that Plaintiffs have demonstrated adequate facts to find the monetary  
8 claims to be incidental to the equitable and declaratory ones. The Due Process specter that  
9 Defendants raise is largely illusory; they rely on no directly controlling cases to make this  
10 argument. As a result, their claims are specious at best.

### 11 **III. Motion to Bifurcate**

12 Plaintiffs also ask the Court to bifurcate issues of liability and injunctive/declaratory  
13 relief from issues of class member restitution. They assert that separating questions of  
14 liability and injunctive relief from the issue of restitution will be a more efficient and  
15 effective manner to manage this case, and will best protect the interests of all parties.  
16 Defendants have not opposed the motion to bifurcate except to note the Government’s  
17 general opposition to certification under Rule 23(b)(2), and otherwise appears to concede the  
18 point of law.

19 Under Federal Rule of Civil Procedure 42(b), “[f]or convenience, to avoid prejudice,  
20 or to expedite and economize, the court may order a separate trial of one or more separate  
21 issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate  
22 trial, the court must preserve any federal right to a jury trial.” When deciding whether to  
23 bifurcate a trial, courts consider “(1) the complexity of the issues; (2) whether there would be  
24 a risk of jury misunderstanding in a non-bifurcated trial; (3) whether bifurcation would  
25 facilitate disposition of the issues; and (4) whether bifurcation would prejudice either of the  
26 parties.” *Arnold*, 158 F.R.D. at 459. As the right to a jury trial has been waived here, only  
27 the first, third, and fourth factors are relevant. The legal issues in this matter are quite  
28 complex, requiring a first impression construction of the relevant statute and regulations. It

1 appears that bifurcation will facilitate disposition in an efficient manner, as if no liability is  
2 found, preparation of a second stage of monetary relief will be unnecessary. Further, neither  
3 party suggests that bifurcation will create prejudice. Rather, bifurcation appears an  
4 instrument of economic efficiency in this matter, as it will limit the expenditure of attorney  
5 time until liability is settled. Bifurcation of liability and injunctive relief from issues of  
6 monetary relief is thus appropriate under Rule 42(b).

7       Additionally, in an abundance of caution, the Court will certify the class under Rule  
8 23(b)(2) as to questions of non-monetary injunctive and declaratory relief, and will defer the  
9 issue of certification as to monetary relief until after the liability determination. While the  
10 Court has concluded that certification of the entire case is not unwarranted, as demonstrated  
11 above, in light of the fierce opposition registered by the Government to any certification in  
12 this case, the Court believes that exercising its broad authority in a class action case to divide  
13 certification may facilitate prompt resolution of this case. *See Conant v. McCaffrey*, 172  
14 F.R.D. 681, 694 (N.D. Cal. 1997). Such a choice in managing this case is consistent with the  
15 management that this Court has exercised in similar circumstances in the past. *See Barefield*  
16 *v. Chevron, U.S.A., Inc.*, C-86-2427, 1988 WL 188433 (N.D. Cal. Dec. 6, 1988). In any  
17 event, resolving issues of liability prior to reaching either certification of or entitlement to  
18 monetary relief claims will enable the Court to more effectively manage this matter.

## 19 20 **CONCLUSION**

21       For the foregoing reasons, Plaintiffs' Motion for Class Certification is GRANTED.  
22 The class of "[a]ll nationals of El Salvador, Honduras, and Nicaragua who have applied to  
23 register or re-register for Temporary Protected Status ("TPS") at any time from August 16,  
24 2001 to the present" is certified as to all injunctive and declaratory relief claims. The Court  
25 will defer ruling on whether to certify the class as to monetary relief until after the resolution  
26 of the liability stage of the case. Plaintiffs' Motion to Bifurcate is likewise GRANTED; the  
27 case will continue with a trial of liability and injunctive/declaratory relief. The precise  
28

1 procedures to be followed in the second phase of the case, if any, will be determined at a  
2 later date.

3

4 **IT IS SO ORDERED.**

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6 Dated: July 9, 2009



THELTON E. HENDERSON, JUDGE  
UNITED STATES DISTRICT COURT

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